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No. 00-1449

In The

Supreme Court of the United States

AG SERVICES OF AMERICA, INC.,

Petitioner,

v.

JOHN D. NIELSEN,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals misapplied the settled doctrine of Seventh Amendment issue preclusion by holding that certain of the prerequisites of the state law equitable claims could not be established due to factual determinations necessarily implied from the jury verdict.

2. Whether the Court of Appeals misapplied New Mexico law in determining that the trial court erred in imposing liability based on the state law doctrines of partnership by estoppel, *quantum meruit* (unjust enrichment) and piercing the corporate veil.

3. Whether Mr. Nielsen's agreement that state law equitable claims were to be tried to the court constituted a waiver of the right to assert issue preclusion based on a jury verdict on state law legal claims tried in the same action.

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RESPONDENT'S BRIEF IN OPPOSITION

This Court should deny the Petition for Writ of Certiorari which seeks review of the Tenth Circuit's reversal of the judgment of the district court.

RESTATEMENT OF THE CASE

The Factual Background of the Case

In late 1991, Mr. Nielsen, a resident of Nebraska, and Terry Lundell, a resident of Arizona, met and determined that they had a mutual interest in farming potatoes on a farm of approximately 1,100 acres near Clovis, New Mexico that Mr. Lundell was in the process of leasing. Mr. Nielsen and Mr. Lundell agreed to operate the business as a Subchapter S corporation known as Diamond Hill Farms Clovis Inc. ("DHFC"). A primary reason Mr. Nielsen wanted the business structured as a corporation was so that he would not be liable for Mr. Lundell's personal debts such as Mr. Lundell's loans from Ag Services of America, Inc. ("Ag Services"). The operational plan for the 1992 crop year involved both Mr. Lundell and Mr. Nielsen putting certain capital and in-kind contributions into the DHFC operation. They would then be repaid from any crop proceeds and would share equally in any profits or losses from the venture.

In addition to the potato acreage, Mr. Lundell individually farmed another 3,000 acres on the same farm, which he planted in corn, wheat and alfalfa, among other crops. Mr. Nielsen had no involvement with the farming operation on this acreage. The proceeds from both the

potato acreage and Mr. Lundell's own farm were both controlled by Mr. Lundell within his own personal bank account.

Mr. Lundell had an ongoing relationship with Ag Services, which is a nationwide agricultural lender and supplier of crop-growing supplies based in Iowa. Much of Mr. Lundell's contribution to the Clovis venture came from a loan he procured from Ag Services. Although Ag Services was aware that Mr. Nielsen and Mr. Lundell were involved together in the farming venture, Mr. Nielsen himself had no business relationship with Ag Services. Ag Services did not believe Mr. Nielsen and Mr. Lundell were involved in a partnership and did not advance loan funds to Mr. Lundell in the belief that Mr. Nielsen was himself liable for the debt. Ag Services did not request that Mr. Nielsen guarantee its loan to Mr. Lundell or become a co-maker or otherwise be responsible for the repayment of the loan.

During the course of the growing season both Mr. Lundell and Mr. Nielsen advanced considerable funds, products and in-kind services to the Clovis venture. Mr. Lundell contributed over $500,000 to the farming operation, much of which was obtained through his loan with Ag Services. Mr. Nielsen contributed over $720,000 to the planting, growing and harvesting of potatoes on the Clovis farm.

Ultimately, the crop was raised, harvested and sold. Although the income from the potato crop was slightly higher than the production costs, Ag Services received only $50,000 of the potato proceeds from Mr. Lundell. Mr. Nielsen received approximately $323,000 of proceeds and

$11,000 worth of burlap bags leaving him with a net loss from the venture in the neighborhood of $390,000. On the other hand, Mr. Lundell took $935,000 in proceeds which resulted in a significant overpayment of his contribution. Mr. Lundell acknowledged his receipt of funds in excess of his contributions and gave Mr. Nielsen a promissory note in the amount of $355,000. Mr. Nielsen later brought suit on this note in state court in Arizona and was granted judgment by default, but Mr. Nielsen has never received any payment on this judgment.

In the meantime, Ag Services sued Mr. Lundell in state court in Iowa for the balance due on the loan. That suit was settled with no cash payment from Mr. Lundell.

The Lawsuit and Its Resolution

Ag Services then instituted the instant diversity action in the United States District Court for the District of New Mexico. Ag Services' complaint sought $691,000 in damages plus punitive damages from defendants Nielsen and DHFC. Ag Services sued both Mr. Nielsen and DHFC on a conversion claim based on Ag Services' purported security interest in the potato crop. Ag Services also sued Mr. Nielsen on a number of other grounds including fraud and negligent misrepresentation and equitable claims of *quantum meruit*, partnership by estoppel and piercing the corporate veil. All claims were state law claims, not federal claims. The legal claims were tried to a jury in late July and early August 1998. The jury found for Mr. Nielsen on the conversion, fraud and negligent misrepresentation claims but found for Ag Services on the conversion claim against DHFC in the amount of

$162,000.[1] The jury had been instructed on corporate officer liability and had been instructed that should they find that Mr. Nielsen directed, controlled, approved or ratified the activity that led to the conversion by DHFC, they must find Mr. Nielsen liable for the corporate conversion. However, as indicated, the jury found in favor of Mr. Nielsen on the conversion claim.

Following the receipt of the verdict, the trial court held a non-evidentiary hearing on the remaining equitable claims. Although counsel for Mr. Nielsen argued that the equitable claims were barred by principles of Seventh Amendment issue preclusion, and that the equitable claims had not been established by the evidence, the trial court issued its judgment in February 1999 in which it found for Ag Services on the equitable claims and ordered judgment in the amount of $412,352 plus prejudgment interest computed at 10% per annum from January 1, 1993.

Mr. Nielsen appealed the judgment to the Tenth Circuit Court of Appeals and the Tenth Circuit reversed, holding that Seventh Amendment issue preclusion barred the judgment on the equitable claims of *quantum meruit* and piercing the corporate veil, and also held that the equitable claims were not adequately supported by the evidence or the trial court's findings.

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[1] At the close of evidence, the trial judge held that the punitive damages claim was unsupported by the evidence and dismissed it on that ground.

Ag Services filed a Petition for Rehearing *En Banc* in which it argued that the Court of Appeals decision conflicted with Tenth Circuit precedent regarding Seventh Amendment issue preclusion. In addition, Ag Services argued that the court's opinion was based on factual misunderstanding and overlooked findings and conclusions of the trial court. In denying rehearing, the Tenth Circuit held that its opinion was consistent with its earlier opinions and otherwise denied the request. *Ag Services of America, Inc. v. Nielsen*, 231 F.3d 726, *reh'g den.*, 235 F.3d 559 (10th Cir. 2000).

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT.

A writ of certiorari should not issue because the Tenth Circuit Court of Appeals did no more than apply well-established principles of Seventh Amendment issue preclusion to state law equitable claims in a diversity action. The Court of Appeals decision breaks no new constitutional ground and does not conflict with earlier Tenth Circuit opinions, with opinions from other Circuits or with opinions issued by this Court.

Nor does the opinion conflict with any New Mexico state court decision on any federal question. Instead, Ag Services argues that the Court of Appeals misapplied state law equitable doctrines. Even if such misapplication is present, and we argue that it is not, certiorari is not available for a review of the application of state law by a federal court.

In sum, while certainly important to the parties, none of the issues presented in this commercial lending case involve the kind of public interest necessary for a writ of certiorari.

Finally, the Tenth Circuit did not err in its decision. Applying well-established theories of issue preclusion, the Court of Appeals prevented the trial judge from circumventing a jury verdict merely because he thought it "erroneous." Mr. Nielsen was completely exonerated from liability on all legal claims presented to the jury, and the factual implications which flowed of necessity from such exoneration barred one or more of the factual prerequisites for the equitable claims of *quantum meruit* and piercing the corporate veil. Furthermore, the equitable claims also were not established for a number of reasons independent of the bar of issue preclusion.

II. REVIEW ON CERTIORARI IS NOT APPROPRIATE IN THIS CASE.

Strikingly absent from Ag Services' Petition is any attempt whatsoever to justify the granting of a writ of certiorari of the decision other than to argue that the Court of Appeals erred. Unlike an appeal to a circuit court, a writ of certiorari is not a matter of right but of judicial discretion. Such a writ will only be granted for "compelling reasons." Sup. Ct. R. 10. Mere error by the lower court is not an adequate basis for its issuance.

Chief Justice Taft expressed the limited purposes of writs of certiorari as follows in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 392-393 (1923):

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.

Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4004.1 echoes Chief Justice Taft's statements:

> In most circumstances, the Supreme Court exercises its discretion on the assumption that it cannot function as an ordinary appellate court concerned with achieving justice in individual cases.

In Rule 10, this Court has set forth guidelines as to which cases may warrant a writ of certiorari. The instant case clearly does not meet these standards. Rule 10(a) advises that certiorari may be appropriate when a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the "same important matter." However, Rule 10 also admonishes that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or mis-application of a properly stated rule of law."

In the Petition Ag Services asserts only that the Tenth Circuit "misapplied the law of Seventh Amendment based issue preclusion," not that it announced a new principle of federal law in conflict with the principles applied by itself or by other circuits. (*See Petition* at 7.)

Indeed, the principle of federal law stated by the Tenth Circuit, i.e., that the trial judge may not make findings contrary to "findings which are explicit or necessarily implied by the verdict" (*Petition Appendix A* at 10a), is not only entirely consistent with previous Tenth Circuit precedent (*see Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1442-3 (10th Cir. 1988) and *Butler v. Pollard*, 800 F.2d 223, 224-26 (10th Cir. 1986)), but is also consistent with the decisions of all other circuit courts which have considered the matter. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d 1094, 1098 (11th Cir. 1987); *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 844 (7th Cir. 1978); *Therman-Tru Corporation v. Peachtree Doors, Inc.*, 44 F.3d 988, 995 (Fed. Cir. 1995); *In Re Lewis*, 845 F.2d 624, 630 (6th Cir. 1988); *Nelson v. Swing-A-Way Mfg. Co.*, 266 F.2d 184, 187 (8th Cir. 1959). In fact, Ag Services itself makes no argument that the Tenth Circuit improperly states this legal principle, instead arguing only that when applying it the Tenth Circuit discerned implied findings that do not flow of necessity from the verdict. (*Petition* at 14-18.)[2] The fact-bound inquiry as to whether the Tenth Circuit properly

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[2] At an early point in its Petition, Ag Services appears to argue that the Court of Appeals held that a trial court may not issue findings which conflict with implied factual issues that the jury may have *possibly* decided. (*Petition* at 6-7.) However, Ag Services seems to drop this argument later in the Petition. (*Petition* at 14-18.) In any event, it is clear from reading the opinion that the Court of Appeals did *not* hold that issues *possibly* decided by the verdict are binding, only those findings "which are explicit or necessarily implied by the verdict" create an issue preclusion. (*Petition Appendix A* at 10a. *Also see* 235 F.3d at fn. 1.)

applied settled Seventh Amendment law to the commercial lending case before it, while of great interest to the parties, is not an issue which warrants the grant of a writ of certiorari.

A basis for certiorari is also not found in the remainder of Rule 10(a). The Tenth Circuit did not decide "an important federal question in a way that conflicts with a decision by a state court of last resort." Instead, the only conflict Ag Services asserts between the Tenth Circuit opinion and New Mexico state court decisions is that, in this diversity case, the Tenth Circuit purportedly misapplied *state law* pertaining to *quantum meruit*, piercing the corporate veil, partnership by estoppel and improper preference. (*Petition* at 10-11, 19, 20-21.) However, alleged misapplications of applicable state law by federal courts is most decidedly *not* a proper basis for the issuance of a writ of certiorari. Even if the state law question is a fundamental ingredient of a federal statutory or constitutional question, this Court will generally not grant review to decide whether a United States Court of Appeals correctly applied state law. As stated in *Butner v. U.S.*, 440 U.S. 48, 52, 58-59 (1979):

> We did not grant certiorari to decide whether the Court of Appeals correctly applied North Carolina law. . . . We decline to review the state law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues.

Also see Haring v. Prosise, 462 U.S. 306, 314 n. 8 (1983) (a challenge to state-law determinations by a court of

appeals will rarely constitute an appropriate subject of Supreme Court review); *Commissioner v. Bosch's Estate*, 387 U.S. 456, 462 (1967) (Court will usually accept court of appeals determinations of state law).

The final provision of Rule 10(a) allows certiorari when a court of appeals "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Ag Services makes no claim that the Tenth Circuit departed from its usual course of proceeding in any manner which would warrant Supreme Court intervention. Ag Services merely argues that in the usual course of the proceedings, the Tenth Circuit erred.

Finally, Rule 10(c) also allows certiorari in regard to court of appeals decisions which "determine an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." As before demonstrated, the principles of Seventh Amendment issue preclusion applied by the Tenth Circuit Court of Appeals are well accepted by all circuit courts which have considered them. Further, these principles grow out of and are consistent with this Court's decision in *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 550 (1990), which recognized the right to a jury determination of all issues common to legal and equitable claims, and in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 50 (1959) and *Dairy Queen v. Wood*, 369 U.S. 469 (1962), both of which recognized the primacy of the jury's determination of legal claims over the Court's determination of equitable claims. Indeed, Ag Services

does not argue that the Tenth Circuit decision directly contravenes these decisions, only that they did not mandate the action the Tenth Circuit took. (*Petition* at 17-18.)

Similarly, as pointed out above, the Tenth Circuit was proceeding on well-traveled ground when it held that issue preclusion was required as to "findings which are explicit or necessarily implied by the verdict," and this holding is entirely consistent with this Court's decisions in *Schiro v. Farley*, 510 U.S. 222 (1994), *Haring v. Prosise*, *supra*, and *Ashe v. Swenson*, 397 U.S. 436 (1970), which simply provides that if an issue was not necessarily determined there can be no preclusion. Again, Ag Services' argument is not that in this case the Court of Appeals has announced a new legal principle that contravenes this Court's precedent, but that the Court of Appeals determined that certain matters were necessarily decided by the jury which Ag Services contends were not. This is not a proper subject for certiorari.

III. THE COURT OF APPEALS PROPERLY APPLIED THE LAW OF SEVENTH AMENDMENT ISSUE PRECLUSION TO REVERSE THE TRIAL COURT'S FINDINGS ON THE STATE LAW EQUITABLE CLAIMS OF *QUANTUM MERUIT* AND PIERCING THE CORPORATE VEIL.

The Tenth Circuit properly ruled that the findings necessarily implied by the jury verdict, particularly the finding that Mr. Nielsen had not directed, controlled, approved or ratified the activity that constituted a conversion, barred any claim based on *quantum meruit* (unjust enrichment) or piercing the corporate veil.

A. No Unjust Enrichment Was Shown.

To prevail on a *quantum meruit* or unjust enrichment claim in New Mexico, one must show that:

(1) another has been knowingly benefitted at one's expense

(2) in a manner such that allowance of the other to retain the benefit would be unjust.

Ontiveros Insulation Co., Inc. v. Sanchez, 3 P.3d 695, 2000-NMCA-51 (N.M. App. 2000). However, here, the jury specifically exonerated Mr. Nielsen of conversion and further, of necessity, determined that he had not directed, controlled, approved or ratified the activity by DHFC that led to the conversion.[3] Also, as the Court of Appeals pointed out, to the extent Mr. Nielsen himself received part of the potato sales proceeds, such receipt did no more than reimburse him for less than half of his contribution to the enterprise. (*Petition Appendix A* at 4a.) Under such circumstances, it is clear that Mr. Nielsen neither knowingly benefitted himself at Ag Services' expense nor did his retention of the funds he did receive create any injustice. The Court of Appeals properly pointed out that the creation of the corporation could not be tied to any improper purpose on Mr. Nielsen's part since the jury verdict found the only improper act taken

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[3] Ag Services' characterization of the implied jury finding as a finding that Mr. Nielsen did not "directly or actively participate in the tort" of conversion inaccurately reflects the jury instruction which required that the jury find Mr. Nielsen liable for the corporate conversion if they found that he "directed, controlled or ratified the activity that led to the conversion." (*Petition Appendix A* at 6a fn. 5.)

by the corporation was a conversion in which Mr. Nielsen did not participate. If Mr. Nielsen took no action to "direct, control or ratify the activity that led to" the corporate conversion, he could not have formed the corporation to impair Ag Services' security interest so as to further the conversion itself. Certainly, under the circumstances set forth, the only basis the trial court relied on for damages in unjust enrichment, which was that it was somehow "wrongful" for Mr. Nielsen to retain any potato proceeds, is completely undercut. (*See* Finding 36, *Petition Appendix C* at 38a.) Mr. Nielsen had every right to repay himself some of the money he had advanced to the venture since the receipt of a benefit which a party has already paid for is neither enrichment nor unjust. As stated in *Ontiveros, supra,* "[I]f a defendant has already *paid* for the benefit, there has been no enrichment, much less *unjust* enrichment." 3 P.3d at 700 (emphasis in original).

If a party has paid for a benefit, it makes no sense to punish the party for receiving it even if another party has not received a benefit for which it has paid. Such "limitations are premised on the bedrock principle that it makes little sense to remedy one wrong by inflicting another." *Ontiveros,* 3 P.3d at 699; *Sundance Mechanical & Utility Corp. v. Atlas,* 118 N.M. 250, 255, 880 P.2d 861 (1994) (if an owner has paid a general contractor for construction, the owner is not liable to an unpaid subcontractor even if the subcontractor has added value to the property by his work).

Ag Services also argues that perhaps the jury decided Mr. Nielsen was not responsible for a conversion on some technical ground such as a defect in the perfection of its

security interest or the subleasing of certain fields or that there had been a waiver of the security interest by Ag Services. The obvious fallacy in this argument is that such defenses would be defenses for DHFC as well as Mr. Nielsen, and since a judgment was entered against DHFC, such defenses clearly could not have been the basis for Mr. Nielsen's exoneration. Ag Services also argues that the statute of limitations could have been used by the jury to protect Mr. Nielsen but, as pointed out by the Court of Appeals in its Order on Rehearing, this could not lead to a conclusion that the statute of limitations was the sole basis for the general verdicts since DHFC was held to be liable. The Court of Appeals concluded, moreover, that even if limitations was partially relied on by the jury, such reliance could only be based on a determination that Mr. Nielsen must have acted properly so as to avoid being estopped from asserting limitations:

> Thus to the extent that the verdicts were based on limitations the jury must have found that DHFC, but not Nielsen, was estopped from relying on limitations, based on the instructions of the court. . . .
>
> If then, the verdict in favor of Nielsen is assumed, arguendo, to have been based on limitations, the jury under that hypothesis must have found that Nielsen did not engage in conduct which amounted to a false representation or concealment of material facts or conduct calculated to convey an impression that the facts were inconsistent with what he now asserts. We are persuaded that such an implied finding completely undercuts the trial court's basis for

> the findings that Nielsen had misused the corporate entity or otherwise committed conduct which made his 'enrichment' unjust.

(*Petition Appendix E* at 54a-55a.)

However, even if the verdict was partially based on limitations, the principles set forth in *Ontiveros* and *Sundance Mechanical & Utility Corp., supra,* would continue to act to bar a finding of unjust enrichment because it is undisputed that Mr. Nielsen merely received a benefit for which he had already paid.[4]

B. The Prerequisites for Piercing the Corporate Veil Were Not Established.

In order to pierce the corporate veil, New Mexico law requires that, first, the corporation must be shown to have been merely Mr. Nielsen's instrumentality and was dominated by him to further his individual purpose to such an extent that the identity of the corporation merged into him as his alter ego. *Scott Graphics, Inc. v. Mahoney,* 89 N.M. 208, 211, 549 P.2d 623, 626 (Ct. App. 1976). Second, it must be shown that the corporation was formed for an improper purpose and, third, there must be

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[4] It should also be pointed out that the applicable statute of limitations would also act to bar the equitable claims of *quantum meruit* and piercing the corporate veil. NMSA 1978, § 37-1-4 provides a four-year statute of limitations. The lawsuit was filed in November 1996. However, the "wrongful conduct" constituting the basis for the *quantum meruit* and piercing the corporate veil claims was the founding of the corporation purportedly for a "wrongful purpose," which occurred over four years earlier in February 1992. (*Petition* at 15.)

proof of proximate causation. *Harlow v. Fibron Corp.*, 100 N.M. 379, 382, 671 P.2d 40, 43 (Ct. App.), *cert. denied*, 100 N.M. 439, 671 P.2d 1150 (1983).

The Court of Appeals properly held that the requirement of an improper purpose had not been shown. Not only did the jury verdict inexorably lead to a conclusion that the corporation was not formed by Mr. Nielsen to convert Ag Services funds, but creating a corporation in order to isolate liabilities among separate entities is *not* a wrongful purpose. *Boughton v. Cotter Corp.*, 65 F.3d 823, 836 (10th Cir. 1995) ("the law permits the incorporation of a business for the very purpose of isolating liabilities among separate entities"); *Anderson v. Abbott*, 321 U.S. 349, 361 (1944) ("[N]ormally, the corporation is an insulator from liability on claims of creditors. The fact that incorporation was desired in order to obtain limited liability does not defeat that purpose. . . . Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched and huge sums of capital attracted." Consequently, the mere fact that one reason Mr. Nielsen wanted to conduct the business in a corporate form was so he would not be personally liable for Mr Lundell's loans and other obligations does not qualify as the necessary improper purpose.

This is in contradistinction to cases where parties who themselves owe a pre-existing debt to a creditor form a corporation to evade payment. *See Anderson, Clayton & Co., Inc. v. Swallows*, 84 N.M. 486, 505 P.2d 431 (1973); *Seaside Indus., Inc. v. Cooper*, 766 S.W.2d 566, 569 (Tex. App. 1989). Here, Mr. Nielsen was never the debtor of Ag Services, and chose to do business in the corporate form partially to ensure that he would not become

ensnared in Mr. Lundell's individual debts. The situation is also inapposite to cases where an existing partnership incurs liability which the partners seek to avoid by the device of creating a corporation without advising creditors who continue to advance money in the belief they are lending money to a partnership. *Compare Inryco, Inc. v. CGR Bldg. Systems, Inc.*, 780 F.2d 879 (10th Cir. 1986). In this case there was no partnership and, as will be seen in Section IV, *infra*, Ag Services never lent money to Mr. Lundell in the belief a partnership existed and that Mr. Nielsen would be liable as a partner.

Further, although the Court of Appeals found it unnecessary to address the other two prerequisites to pierce the corporate veil, their absence also supports the Court of Appeals' decision. Certainly, the requisite domination and control were never shown. Mr. Nielsen was not even the owner of a majority of the stock much less one who had the kind of control required, i.e., "Not mere majority or complete stock control but complete domination, not only of finances, but of policy and business practice." *Garcia v. Coffman*, 124 N.M. 12, 16, 946 P.2d 216, 220 (Ct. App. 1997), quoting *Lowendahl v. Baltimore & Ohio R.R.*, 247 A.D. 144, 287 N.Y.S. 62, *aff'd*, 272 N.Y. 360, 6 N.E.2d 56 (1936). Certainly, any concept of absolute domination of DHFC by Mr. Nielsen is completely dispelled by the evidence that it was Mr. Lundell, not Mr. Nielsen, who had control of the finances of the corporation to such an extent that he could pay himself over $900,000 and it was Mr. Lundell, not Mr. Nielsen, who clearly was the party who engineered the corporate conversion. (*Petition Appendix A* at 14a.)

Additionally, the element of proximate cause did not exist. The only damages found by the jury to have been incurred by Ag Services were those caused by the corporation's conversion, an act in which Mr. Nielsen did not even participate. However, to pierce the corporate veil, "[T]he individual who is sought to be charged personally with corporate liability must have shared in the moral culpability or injustice." *NLRB v. Greater Kansas City Roofing*, 2 F.3d 1047, 1053 (10th Cir. 1993). "[T]he fraud or inequity sought to be eliminated must be that of the party against whom the doctrine is invoked, and such party must have been an actor in the course of conduct constituting the abuse of corporate privilege." 1 *Fletcher Cyclopedia of Corporations*, § 41.20 at 639.

IV. THE COURT OF APPEALS PROPERLY FOUND THE PREREQUISITES FOR THE EQUITABLE REMEDY OF PARTNERSHIP BY ESTOPPEL HAD NOT BEEN ESTABLISHED.

The Court of Appeals properly held that the prerequisites for partnership by estoppel had not been established. To show a partnership by estoppel it generally must be shown that a lender such as Ag Services believed it was lending money to a partnership and expected that a third party such as Mr. Nielsen would be liable on the note along with Mr. Lundell as his partner.[5] However, it

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[5] Ag Services mischaracterizes the Court of Appeals decision as holding that there was no partnership by estoppel "because Ag Services did not extend credit to a partnership entity." (*Petition* at 28.) However, the Court of Appeals correctly based its opinion, not on whether there actually *was* a

was unrebutted that Ag Services lent the money with no belief that a partnership existed and had no expectation that Mr. Nielsen was going to be responsible to pay the loan. (*Petition Appendix A* at 19a-20a.) Whether or not a partnership was named on the loan documents was not determinative; however, partnership by estoppel generally cannot exist without an expectation on the part of the lender that the defendant was going to be liable as a partner on the loan. Ag Services has never provided any authority to the effect that partnership by estoppel is available against any individual such as Mr. Nielsen who was merely involved in a business with a borrower. If a sophisticated lender such as Ag Services had wanted to bind Mr. Nielsen to the obligations imposed by its loan to Mr. Lundell, it should have asked him to sign a guaranty. However, it failed to do so and the Court of Appeals properly held that it could not create a guaranty through the device of a partnership by estoppel.

Another requisite for the establishment of a partnership by estoppel was also properly found to be lacking by the Court of Appeals as there was no evidence of any public representations of partnership to the general community prior to the advancement of credit by Ag Services. (*Petition Appendix A* at 23a.)

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partnership entity, but on whether Ag Services *thought* there was.

V. AG SERVICES' OTHER ASSERTED GROUNDS FOR A WRIT ARE WITHOUT MERIT.

A. There Was No Wrongful Preference.

Ag Services argues at pp. 18-19 of its Petition that the trial court's decision on the wrongful preference claim was valid. However, as properly pointed out by the Court of Appeals, no separate claim to recoup a wrongful preference was set forth in this case and the trial court did not base its ruling on this ground. (*Petition Appendix A* at 7a fn. 6.)[6] Therefore, the Court of Appeals properly stated that it did not need to address this issue further. The Petition simply ignores the fact that the Court of Appeals held there was no wrongful preference claim and continues to argue as if one actually existed.

To the extent the Court of Appeals considered the idea of a wrongful preference as an element of the unjust enrichment claim, it properly pointed out that a finding of wrongful preference is only appropriate when a corporate insider receives a preference to the detriment of a corporate creditor. (*Petition Appendix A* at 17a.) However, as pointed out by the Court of Appeals, Ag Services was not a corporate creditor; it was Mr. Lundell's creditor. Ag

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[6] In fact, a claim of wrongful preference is not an equitable claim but a legal one arising from the common law. *Smith v. Cox*, 113 N.M. 682, 684, 831 P.2d 981, 983 (1992) ("appellant contends that such preferential treatment gives rise to a common law cause of action. . . . We agree."). Consequently, if Ag Services had wished to have this issue determined, it should have been submitted to the jury. The trial court had no power to determine it.

Services argues that the trial court found that the corporation assumed Ag Services' advances to Mr. Lundell as its own business obligation. However, this is not the case. A review of the Findings cited by Ag Services shows *no* finding that the corporation accepted the Ag Services loan as its debt. At most, those Findings show that Mr. Lundell and Mr. Nielsen recognized the Lundell loan was a "business obligation" of Mr. Lundell's which would be repaid from crop proceeds. In fact, it is obvious that Messrs. Nielsen and Lundell did not advise Ag Services the loan was accepted as a corporate debt because the trial court found that Ag Services was not even aware of the corporation's existence. (*Petition Appendix A,* Findings 9-11, at 31a-32a.)

Ag Services also argues in the Petition that it was a creditor of DHFC because it later received a conversion judgment against it. This is a meritless bootstrap argument. Ag Services only became a creditor of DHFC *after* it received its judgment in 1998. At the time of the purported wrongful preference in 1992, DHFC was not a corporate creditor nor did it claim to be and a corporate officer could not be liable in a situation where no pre-existing creditor relationship had been established before the purported preference took place.

Additionally, the finding of a wrongful preference requires the insolvency of the corporation at the time of the preference. Although requested to so find by Ag Services, the trial court made no finding of insolvency and, indeed, there was no evidence of the kind of insolvency necessary for a wrongful preference, which is described as follows in 15A *Fletcher Cyclopedia of Corporations,* § 7472 at 273-274.

> Under the rule prohibiting preferences, a corporation is not insolvent, as a general rule, merely because it is embarrassed and cannot pay its debts as they become due, or because its assets, if sold, would not bring enough to pay all its liabilities, if it is still prosecuting its business in good faith with a reasonable prospect and expectation of continuing to do so.

B. Mr. Nielsen Did Not Waive His Seventh Amendment Rights to Assert Issue Preclusion.

Ag Services seems to argue that because Mr. Nielsen agreed that equitable claims are properly determined by the trial judge, he somehow waived his right to require that the trial judge's decision comport with the issues necessarily decided by the jury in determining the legal claims. Ag Services cites no authority for this remarkable proposition and none exists. A party should not have to contest the incontestable – that there is no right to have a jury decide an equitable claim – in order to preserve a constitutional right to require that the issues decided by a jury bind the trial court in the exercise of its equitable jurisdiction.

Nor is there any merit to Ag Services' argument that Seventh Amendment issue preclusion cannot be asserted unless special interrogatories are given to the jury pursuant to Fed. R. Civ. P. 49. In reality, many of the issue preclusion cases are ones in which only general verdicts were rendered, as a general verdict has preclusive effect on all issues necessarily determined. *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d at 1094 ("[i]t is well settled that the court may not make findings contrary to or

inconsistent with the jury's resolution . . . of that same issue as *implicitly reflected in its general verdict,*" quoting *Craft v. Bd. of Trustees of Union of Illinois*, 793 F.2d 140, 143 (7th Cir. 1986) (emphasis added). *Also see Nelson v. Swing-A-Way Mfg. Co.*, 266 F.2d at 187; *Lindsey v. American Cast Iron Pipe Co.*, 810 F.2d at 1098 n. 4; *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d at 844; and *Robison v. Volkswagenwerk A G*, 56 F.3d 1268 (10th Cir. 1995). While it is true that if one submits detailed special interrogatories, but neglects to submit a special interrogatory on a specific issue, one waives a jury trial on that issue, this has no application because all legal issues, to-wit: conversion, negligent misrepresentation and fraud, were submitted to the jury; therefore, there was no waiver.

C. The Verdict Was Appealable by Ag Services.

Ag Services makes the unique argument that Seventh Amendment issue preclusion should not apply because it never had the opportunity to appeal or otherwise contest the verdict. This is not true. Clearly, the verdict was adverse to Ag Services because it only gave it a partial judgment against a then defunct corporation and found in favor of Mr. Nielsen – the only defendant who might be able to satisfy a judgment. Nothing prevented Ag Services from filing a motion asking for relief in the form of a new trial. Nor would Ag Services have been prevented from moving for a judgment as a matter of law prior to the entry of the verdict and renewing such motion if necessary after the verdict was entered.

It also was obvious, both in the argument to the trial judge and in post-trial briefing, that Mr. Nielsen was

taking the position that the verdict was a bar to the court entering judgment against Mr. Nielsen on the equitable claims. In light of this, Ag Services could have taken the precautionary measure of filing a cross-appeal pursuant to Fed. R. App. P. 4(a)(3) in order to attempt to invalidate the verdict so as to avoid the imposition of any issue preclusion. However, Ag Services made the strategic decision not to take any of these actions. Having failed to act to take the avenues open to it in order to attempt to avoid any preclusion of issues based on the jury verdict, Ag Services should not now be allowed to complain that such preclusion is "manifestly unfair."

Further, this argument was never made to the Court of Appeals and is made for the first time here. This Court has repeatedly ruled that it will not consider an issue not raised in the lower courts. *Rogers v. Lodge*, 458 U.S. 613, 628 n. 10 (1982); *FTC v. Grolier, Inc.*, 462 U.S. 19, 23 n. 6 (1983); *Kosak v. U.S.*, 465 U.S. 848, 850 n. 3 (1984).

CONCLUSION

For the foregoing reasons, Respondent asks that this Court deny Ag Services' Petition for Writ of Certiorari.

Respectfully submitted,

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